No. 01-1048

In the Supreme Court of the United States

JOEL G. AUDAIN, A/K/A NEW CHIEF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the district court committed reversible error by sentencing petitioner to life imprisonment for conspiring to possess cocaine with intent to distribute it and conspiring to import cocaine in the absence of allegations in the indictment and jury findings on the specific quantities of drugs involved in petitioner's offenses.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 254 F.3d 1286.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 2001. The petition for rehearing was denied on September 25, 2001 (Pet. App. A11-A12). The petition for a writ of certiorari was filed on December 26, 2001 (day following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of conspiring to import co-

caine, in violation of 21 U.S.C. 952(a) and 963 (Count One); one count of conspiring to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846 (Count Two); one count of conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h) (Count Five); and one count of money laundering, in violation of 18 U.S.C. 2 and 1957 (Count Six). Petitioner was sentenced to serve four concurrent terms of life imprisonment. The court of appeals affirmed in part and vacated and remanded in part. Gov't C.A. Br. 1-2; Pet. App. A6; Third Superseding Indictment 14, 16.

1. Petitioner was a member of a large-scale drug conspiracy that established a cocaine transportation and distribution network from Colombia to the United States from June 1987 to November 1996. Gov't C.A. Br. 3. The organization used corrupt Haitian military officials to protect cocaine shipments from Colombia to Haiti and from Haiti to the United States. In 1991, members participated in a *coup d'etat* in Haiti, overthrowing President Jean Bertrand Aristide. Thereafter, they placed co-conspirators in key positions at international airports and seaports to facilitate their cocaine network. The group primarily brought cocaine into airports in Miami and New York, initially concealing the drugs in cargo shipments. It later used couriers to transport cocaine in passenger luggage. It also bribed airport and government employees in Miami and New York to ensure that the cocaine securely moved through the airports without passing security checkpoints. Once the cocaine arrived in the United States, members transported it to distributors in Miami, New York, and Chicago. Participants conspired to launder drug profits by bribing key Haitian and United States government and military personnel,

investing in additional cocaine, and concealing proceeds by purchasing realty and luxury items. *Ibid.*

Petitioner worked as an immigration inspector for the Immigration and Naturalization Service (INS) at the Miami International Airport (MIA). Pet. App. A6. Beginning in 1987 or 1988, petitioner began moving the conspiracy's cocaine through MIA by escorting couriers through the terminal while he was working or dressed in his INS uniform. For example, in 1990 or 1991, petitioner escorted conspirator Evens Gourgue, an MIA terminal operations specialist who acted as a drug courier for the organization, through MIA when Gourgue was carrying over 30 kilograms of cocaine. 11/5/98 Tr. 188-191. Petitioner escorted courier Limongy Jean through MIA on three or four occasions. On one of those occasions, Jean was carrying 30 to 35 kilograms of cocaine. *Id.* at 207-209; 11/9/98 Tr. 114-120. Petitioner also escorted Jean's wife, courier Mari Juni Jean, on one or two occasions. 11/9/98 Tr. 114-120. Airport personnel observed petitioner escorting unauthorized personnel through MIA's secure areas on other occasions as well. Gov't C.A. Br. 8; 11/9/98 Tr. 20-27. According to Gourgue, who also escorted couriers through MIA, couriers usually carried 22 to 33 kilograms of cocaine in their bags. See 11/5/98 Tr. 183-185; see, *e.g.*, 11/9/98 Tr. 141-143 (testimony of courier Marie Juni Jean that she and her companion carried 27 kilograms of cocaine through MIA on one occasion).

Petitioner used the drug proceeds that he received as payment for his services to reinvest in additional cocaine. Gov't C.A. Br. 33. He also invested his drug proceeds in real estate under a corporate name and opened foreign accounts in other persons' names to conceal the source of the funds. *Id.* at 19, 33-34.

2. Petitioner and a number of his co-conspirators were charged in a multi-count indictment with drug conspiracy and money laundering violations. Count One charged petitioner with conspiring to import "a mixture and substance containing a detectable amount of cocaine," in violation of 21 U.S.C. 952(a) and 963. Third Superseding Indictment 2, 15. The indictment charged that the object and purpose of the conspiracy was "to import and subsequently distribute thousands of kilograms of cocaine in the United States." *Id.* at 2-3. Count Two charged petitioner with conspiring to possess with intent to distribute "a mixture and substance containing a detectable amount of cocaine," in violation of 21 U.S.C. 841(a)(1) and 846. Third Superseding Indictment 15. In Count Five, petitioner was charged with conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h), and in Count Six petitioner was charged with money laundering, in violation of 18 U.S.C. 2 and 1957. Third Superseding Indictment 17-22. A penalty sheet attached to the indictment advised petitioner that he faced a minimum penalty of ten years' imprisonment and a maximum penalty of life imprisonment on Counts One and Two, and a maximum penalty of 20 years' imprisonment on Counts Five and Six. Gov't Supp. C.A. Br. 2.

Petitioner did not request an instruction at trial requiring the jury to find the quantity of drugs involved in any of his offenses, and the court gave no such instruction. Petitioner was found guilty on all counts. Gov't C.A. Br. 2.

3. On February 12, 1999, the district court sentenced petitioner to life imprisonment on the drug conspiracy charges (Counts One and Two), based in part on its determination at sentencing that at least 150 kilograms of cocaine were involved in the offenses. Sent. Tr. 74.

The district court also imposed sentences of life imprisonment on Count Five (conspiracy to commit money laundering) and Count Six (money laundering). Judgment 3. The court further sentenced petitioner to serve concurrent terms of five years' supervised release on all counts following his imprisonment, and ordered petitioner to pay a special assessment of $400. *Id.* at 4-5.

4. The court of appeals affirmed in part and vacated and remanded in part. Pet. App. A1-A10. In his initial brief on appeal (filed November 2, 1999), petitioner contended that the prosecutor made improper remarks in closing argument and that the district court erred in enhancing petitioner's sentence by two levels for possession of a firearm. See Pet. C.A. Br. ii-iv, 57. In a supplemental brief, relying on *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), petitioner contended that the district court committed reversible error in sentencing him to life imprisonment on Counts One and Two where the indictment did not specifically charge and the jury did not find the quantity of cocaine involved in his offenses. See Pet. Supp. C.A. Br. 3-10. The court of appeals briefly explained its rejection of petitioner's argument that the firearm enhancement was inapplicable. Pet. App. A6-A10. It then "summarily affirm[ed]" petitioner's convictions and sentences, *id.* at A6, except, as conceded by the government in the government's supplemental brief, it found that the district court erred in sentencing petitioner to life imprisonment on Count Five since 18 U.S.C. 1956(h) carries a maximum sentence of only 20 years' imprisonment. The court therefore vacated that portion of petitioner's

sentence and remanded for resentencing on Count Five.* Pet. App. A6 & n.1.

DISCUSSION

Petitioner contends (Pet. 3-30) that his life sentences on the cocaine conspiracy counts were unconstitutionally imposed because they were increased beyond the ordinary statutory maximums based on the amounts of cocaine involved in his offenses, and that fact (drug quantity) was not alleged in the indictment. See 21 U.S.C. 841(b); 21 U.S.C. 960(b) (1994 & Supp. V 1999) (providing for escalating maximum sentences based on involvement of increased quantities of drugs in the offense). That issue, which was not raised in the district court, presents essentially the same claim as is before the Court in *United States* v. *Cotton*, No. 01-687 (to be argued Apr. 15, 2002). Accordingly, the petition in this case should be held pending the Court's decision in *Cotton* and then disposed of as appropriate in light of that decision.

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* The district court also erred in sentencing petitioner to life imprisonment on Count Six, as 18 U.S.C. 1957 carries a maximum of ten years' imprisonment, see 18 U.S.C. 1957(b)(1). On November 30, 2001, petitioner was re-sentenced on Counts Five and Six to concurrent terms of 20 years' imprisonment (Count Five) and ten years' imprisonment (Count Six). See 11/30/01 Order Amending Judgment & Commitment Order 1.

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CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *United States* v. *Cotton*, cert. granted, 122 S. Ct. 803 (2002), and then disposed of accordingly.

Respectfully submitted.

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